



STATE OF NEW JERSEY

In the Matter of Freddie Frazier,
Department of Corrections

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2018-2332

Request for Back Pay

ISSUED: APRIL 2, 2019 (SLK)

Freddie Frazier, represented by Mario A. Iavicoli, Esq., requests unpaid back pay in the amount of \$89,808.52 minus proper tax and other deductions.

By way of background, in *In the Matter of Freddie Frazier* (CSC, decided December 21, 2011), the Civil Service Commission (Commission) upheld the Department of Corrections' (Corrections) removal of the appellant as a Senior Correction Officer at Northern State Prison. Additionally, it ordered that any award of mitigated back pay due to the appellant as a result of the Appellate Division's April 20, 2011 decision be limited to the time period of six months from the date of his initial removal, June 13, 2001 to January 13, 2004.

In Frazier's February 2018 request, he indicates that in a September 15, 2015 letter, he accepted Corrections' determination that he was entitled to back pay in the amount of \$187,018.68. Thereafter, without explanation, the State paid Frazier \$97,201.16¹ instead of \$187,018.68. He submits Corrections' breakdown of the payroll deductions:

Gross Award Payment	\$97,210.16
Base Wages (subject to pension)	\$129,401.65

¹ Frazier's submission indicates that he was paid \$97,201.16, but the exhibit that the submission references is for a check in the amount of \$34,794.97.

Pension Deduction	\$10,999.14
Cont. Ins.	0.00
Medicare	\$1,409.55
U.I.C.	\$136.00
T.D.I.	\$80.00
F.L.I.	\$28.80
F.I.C.A.	\$6,027.03
Misc. Deduction (Support)	\$19,460.03
Federal Income Tax	\$21,552.76
NJ State Income Tax	<u>\$2,721.88</u>
 Total Deductions	 \$62,415.19
 Net Pay	 \$34,794.97

Frazier states that he received the check² and the list of payroll deductions without any correspondence or explanation as to why the amount was reduced by almost \$90,000. He also presents that he received no explanation as to how the agreed amount went from \$187,018.68 to \$97,210.16. Frazier states that he received no explanation as to why the \$129,401.65 Base Wages (subject to pension) was reduced to \$97,201.16 before deductions were taken out. Frazier requests to receive payment in the amount of \$89,808.52 minus proper tax and other deductions.

In response, Corrections states that back pay was limited to the time period from six months from the date of his initial removal, June 13, 2001 to January 13, 2004, as per the Commission's January 11, 2012 decision.³

CONCLUSION

N.J.A.C. 4A:2-1.1 provides, unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed.

N.J.A.C. 4A:2-2.10(f) provides that when the Commission awards back pay and benefits, determination of the actual amounts shall be settled by the parties whenever possible. *N.J.A.C.* 4A:2-2.10(g) provides that if settlement on an amount

² The check is dated October 13, 2015.

³ The Commission notes that the Division of Appeals and Regulatory Affairs (DARA) made attempts by letter, phone, and e-mail to receive a response from the Attorney General's Office in this matter, but none was received. Thereafter, DARA contacted Corrections directly and received the above response. There is no indication that this response was sent to Frazier's attorney. However, as this response did not address the substantive issues on how Corrections made its calculations, and is otherwise not germane give the Commission's ultimate decision, it is included for informational purposes.

cannot be reached, either party may request, in writing, Commission review of the outstanding issue.

N.J.A.C. 4A:2-1.1(d) provides, in pertinent part, that a hearing is required where the Commission finds that a material and controlling dispute of fact exists that cannot be resolved by the written record.

Initially, the Commission notes that Frazier received his last payment from the appointing authority, which was in the amount of \$34,794.97, sometime after the date of the October 13, 2015 check. This appeal was filed in February 2018, which is over two years after 20 days from when he received notice that he was not being paid the full amount he believed he was entitled to receive. Further, Frazier has not provided any explanation as to why he did not file his appeal until more than two years after he received this payment. Therefore, the Commission finds that this appeal is untimely.

Additionally, even assuming, *arguendo*, that Frazier's appeal was timely, the Commission could not make a reasoned determination based on the current record. Specifically, it appears that the parties agreed to back pay in the amount \$187,018.68 less tax and other appropriate payroll deductions. The Commission notes that it appears that Frazier received one check for \$34,794.97 based on a \$97,210.16 award. However, the record is unclear as to how Corrections determined those amounts and whether they account for the correct amount due. Concerning the \$34,794.97 payment, Corrections provided Frazier a payroll breakdown that indicated Gross Award Payment (\$97,210.16), Base Wages (subject to pension) \$129,401.65, various deductions (\$62,415.19 in total), and Net Pay (\$34,794.97). However, Corrections did not provide an explanation as to how it determined each line of the breakdown or why the initial amount is different from the apparent agreed upon amount. In his request, Frazier believes he is entitled to an additional \$89,808.52 minus proper tax and other deductions; however, he does not indicate what the actual total amount should be after deductions. Further, although given numerous opportunities, neither the Attorney General's Office nor Corrections provided an explanation as to how the award was determined.

ORDER

Therefore, it is ordered that this matter is dismissed as untimely.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27th DAY OF MARCH, 2019



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Chairperson
Civil Service Commission

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Attachment

c: Mario A. Iavicoli, Esq.
Donna S. Arons, DAG
Christopher J. Hamner, DAG
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Records Center

A-4



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Freddie Frazier,
Department of Corrections

CSC Docket No. 2011-4777
OAL Docket No. CSV 7489-11

11 2012

ISSUED:

(KAG)

The appeal of Freddie Frazier, a Senior Correction Officer at Northern State Prison, Department of Corrections, of his removal on charges, was before Administrative Law Judge JoAnn LaSala Candido (ALJ), who rendered her initial decision on October 31, 2011. Exceptions were filed on behalf of the appellant and the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 21, 2011, adopted the Findings of Fact and Conclusions as contained in the ALJ's initial decision and the recommendation to grant the appointing authority's motion for summary decision and uphold the removal.

DISCUSSION

By way of background, on October 14, 1999, the appellant was indicted by a Hudson County Grand Jury on charges of theft, unlawful taking, third degree (*N.J.S.A. 2C:20-3*) and possession of a weapon for an unlawful purpose, second degree (*N.J.S.A. 2C:39-4a*) as a result of an incident involving his live-in girlfriend. The charge of theft was dismissed and the weapons possession charge was amended to simple assault (*N.J.S.A. 2C:12-1a(3)*). Specifically, *N.J.S.A. 2C:12-1a(3)* provides that a person is guilty of simple assault if he or she "attempts by physical menace to put another in fear of imminent serious bodily injury." On September 18, 2000, the appellant pled guilty to the simple assault charge.

The appellant was initially removed from employment, effective June 13, 2001, based on the appointing authority's assertion that he was prohibited from possessing a firearm pursuant to the "Lautenberg Amendment" (18 U.S.C.A. § 922(g)(9)). The "Lautenberg Amendment" amended the federal Gun Control Act of 1968 and provided that any person convicted of any qualifying misdemeanor crime of domestic violence is prohibited from owning or possessing a firearm. The former Merit System Board (Board) affirmed the appellant's removal. *See In the Matter of Freddie B. Frazier, Sr.* (MSB, decided January 26, 2005). The appellant appealed that decision to the Appellate Division of Superior Court. The court noted that *N.J.S.A. 2C:12-1a(3)* was not a misdemeanor crime of domestic violence, because it did not have "as an element, the use or attempted use of physical force or the threatened use of a deadly weapon." Accordingly, the court concluded that the appellant was not prohibited by the Lautenberg Amendment from carrying a firearm as a result of his conviction under *N.J.S.A. 2C:12-1a(3)* and reversed the Board's decision since it was based solely on the Lautenberg Amendment. However, it recognized that Frazier's conviction, and the conduct upon which it was based, may warrant disciplinary action independent of the Lautenberg Amendment. Therefore, the court remanded the matter to the Board for such further disciplinary proceedings as may be appropriate. *See Freddie B. Frazier v. Northern State Prison*, 392 *N.J. Super.* 514 (App. Div. 2007).

On remand, Administrative Law Judge Jeffrey A. Gerson recommended that the appellant's removal be modified to a six-month suspension. However, upon its *de novo* review, the Commission upheld the appellant's removal. Specifically, the Commission noted that *N.J.S.A. 2C:39-7(b)2* prohibits "[a] person having been convicted in this State or elsewhere of a disorderly persons offense involving domestic violence, whether or not armed with or having in his possession a weapon" from "purchas[ing], own[ing], possess[ing], or control[ling] a firearm." Pursuant to *N.J.S.A. 2C:25-19(a)2* and (d), a person is guilty of an act of domestic violence where convicted of simple assault in violation of *N.J.S.A. 2C:12-1* against, *inter alia*, a spouse, a former spouse, a former or present household member, or a person with whom the offender has had a dating relationship. Since the appellant's conviction for simple assault on September 18, 2000 constituted a conviction for a disorderly persons offense involving domestic violence, the Commission concluded that he was prohibited from "purchas[ing], own[ing], possess[ing], or control[ling] a firearm" in accordance with *N.J.S.A. 2C:39-7(b)2*. Upon the appellant's appeal, the Appellate Division reversed the Commission's decision, holding that the appellant could not be removed based on the disability imposed by *N.J.S.A. 2C:39-7(b)2*, since he was not specifically charged with violating that statute in the Preliminary or Final Notices of Disciplinary Action. Nevertheless, the Appellate Division affirmed the initial decision of Administrative Law Judge Gerson to impose a six-month suspension on the charge of conduct unbecoming a public employee. *See In the Matter of F.B.F. and Northern State Prison, New Jersey Department of Corrections*, Docket No. A-0956-08T1 (App. Div. April 20, 2011).

Subsequently, the appointing authority issued a Preliminary Notice of Disciplinary Action dated May 10, 2011, charging the appellant with inability to perform duties, conduct unbecoming a public employee, other sufficient cause, and violations of departmental regulations concerning conduct and possession of a firearm. Specifically, it was charged that “[a]s of January 14, 2004,¹ you are unqualified and unable to legally possess or carry a firearm due to a previous criminal conviction,” and thereby the appellant was unable to perform the essential functions of a Senior Correction Officer. Following a departmental hearing, at which the appellant did not appear, a Final Notice of Disciplinary Action was issued on June 2, 2011,² upholding the charges and imposing a removal. Upon the appellant’s appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ found that there was no dispute that the appellant pled guilty to the charge of simple assault, a disorderly persons offense, as a result of an incident involving his live-in girlfriend. Thus, the ALJ concluded that the appellant was convicted of a disorderly persons offense involving domestic violence and was prohibited from possessing or carrying a firearm, a requirement of his position, as of the January 14, 2004 amendment to *N.J.S.A. 2C:39-7(b)*. Based on this disability and the conduct underlying the conviction, the ALJ granted the appointing authority’s motion for summary decision and recommended upholding the charges and the removal.

It is noted that the ALJ also addressed two ancillary procedural issues related to the appellant’s instant removal. First, the appellant contended that present disciplinary charges were issued in violation of the “45-day rule” set forth in *N.J.S.A. 30:4-3.11a*, which provides that a complaint charging a violation of internal rules and regulations must be filed no later than the 45th day on which the person filing the complaint obtained sufficient information to file the complaint. The ALJ concluded that there was no such violation, since the appellant was also charged with inability to perform duties and conduct unbecoming a public employee in violation of *N.J.A.C. 4A:2-2.3(a)*. Second, the appointing authority argued that the effective date for the appellant’s removal should be retroactive to January 14, 2004, the date on which *N.J.S.A. 2C:39-7(b)* was amended to preclude him from performing his job duties. The ALJ rejected this argument, noting that there was no mechanism in Civil Service law or rules to impose retroactive disciplinary actions. Accordingly, the ALJ recommended utilizing a current effective date for the appellant’s removal.

¹ January 14, 2004 was the effective date of the amendment to *N.J.S.A. 2C:39-7(b)* to prohibit individuals convicted of domestic violence offenses from possessing a firearm.

² The Final Notice of Disciplinary Action does not contain an effective date for the appellant’s removal.

In its exceptions to the ALJ's initial decision, the appellant argues that the ALJ found that he threatened his girlfriend with a weapon and placed her in fear for her life, when there was nothing in the record to support this finding. He also maintains that the "45-day" rule should preclude the institution of disciplinary charges several years after the incident occurred. In its exceptions, the appointing authority requests that the appellant's removal date be recorded as June 2, 2011, but that the Commission order that he is not entitled to any back pay in accordance with the Appellate Division's April 20, 2011 decision between January 14, 2004 and June 2, 2011.

Upon its *de novo* review of the record, the Commission agrees that the appellant's removal should be upheld. As an initial matter, the Commission agrees that there is no basis to dismiss the charges based on the alleged violation of the "45-day rule." *N.J.S.A. 30:4-3.11a* provides:

A person shall not be removed from employment or a position as a State corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the Department of Corrections, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint.

It is noted that, like the time limitation set forth for Police Officers in *N.J.S.A. 40A:14-147*, the 45-day time limitation contained in *N.J.S.A. 30:4-3.11a* only expressly applies to charges related to violations of departmental rules and regulations. See e.g., *Hendricks v. Venettone*, Docket No. A-1245-91T5 (App. Div. October 29, 1992); *In the Matter of Bruce McGarvey v. Township of Moorestown*, Docket No. A-684-98T1 (App. Div. June 22, 2000). Where, as here, the appellant is also charged with inability to perform duties, conduct unbecoming a public employee and other sufficient cause in violation of *N.J.A.C. 4A:2-2.3(a)*, the statutory 45-day time limitation is inapplicable. The time limitation set forth above is, thus, not applicable to all of the charges against the appellant. See *McElwee v. Borough of Fieldsboro*, 400 *N.J. Super.* 388 (App. Div. 2008). See also, *In the Matter of Claudy Augustin* (MSB, decided April 23, 2008); *In the Matter of James Cassidy* (MSB, decided August 12, 2003); *In the Matter of Steven Palamara* (MSB, decided April 10, 2002).

Further, with respect to the merits, as of January 14, 2004, there is no dispute that *N.J.S.A. 2C:39-7(b)2* prohibited the appellant from possessing a firearm, which was a requirement of his position. There is also no dispute that he pled guilty to simple assault which resulted from a dispute with his live-in

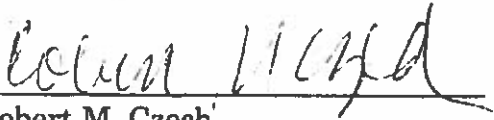
girlfriend. Thus, the Commission finds that the appellant was guilty of all charges set forth in the 2011 disciplinary notices. The Commission also agrees with the ALJ's assessment of the penalty in this matter, particularly since the appellant's inability to perform his duties as a result of this conviction mandates his removal from his position as a Senior Correction Officer. With regard to the effective date, the Commission finds that a current effective date, *i.e.*, June 2, 2011 is warranted. However, it cannot be ignored that the appellant's initial removal on charges related to this incident, which was effective June 13, 2001, was modified to a six-month suspension by the Appellate Division. As a result of that decision, the appellant was entitled to mitigated back pay, benefits and seniority beginning six months from the date of his removal until the date of his reinstatement. However, it also cannot be ignored that, effective January 14, 2004, State law was amended to prohibit the appellant from possessing a firearm due to his conviction. Notwithstanding the procedural imperfections, the fact remains that the 2004 amendment to *N.J.S.A. 2C:39-7(b)* rendered the appellant unable to perform his duties. It is settled that an employee is not entitled to a back pay award for any period he is unable to work. *See N.J.A.C. 4A:2-2.10(d)9. See also, In the Matter of Deedra Richmond* (MSB, decided January 25, 2006); *In the Matter of Joseph Hornick* (MSB, decided January 29, 2003); *In the Matter of Carl Underwood* (MSB, decided July 10, 2001); *In the Matter of Charles Diehm* (MSB, decided October 14, 1998); *In the Matter of Andrew Ross* (MSB, decided January 2, 1996). Therefore, the Commission concludes that the appellant's entitlement to mitigated back pay as a result of his six-month suspension is limited to the time period commencing six months from the date of his initial removal, June 13, 2001, and ending on January 13, 2004.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a removal was justified. Therefore, the Commission affirms that action and dismisses the appeal of Freddie Frazier. It is further ordered that any award of mitigated back pay due to the appellant as a result of the Appellate Division's April 20, 2011 decision be limited to the time period of six months from the date of his initial removal, June 13, 2001, to January 13, 2004.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21st DAY OF DECEMBER, 2011



Robert M. Czech
Chairperson
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Attachment

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TEAM: 2 AUTONOMOUS: N MCNSU AA/JURIS STATUS: A
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AA NAME: LISA GAFFNEY, MANAGER 2, HR FROM PAYROLL#:
ADDRESS-LINE-1: DEPARTMENT OF CORRECTIONS TO PAYROLL#:
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Comments